

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Case No. 10-MD-02197-DAK

TRANSCRIPT OF STATUS CONFERENCE HEARING

HELD BEFORE THE HONORABLE DAVID A. KATZ

SENIOR UNITED STATES DISTRICT JUDGE

Appearances:

(As noted in the record.)

Reporter
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(Call to the order of the Court.)

THE COURT: Thank you. Please be seated, ladies and gentlemen.

Welcome everybody back to sunny Florida. Don't look outside, because since you came in, a wall much water descended on the Palm Beaches, and much needed water, I might add. But hopefully this, too, will pass.

We have an agenda, and I'll ask counsel to begin the discussion that I believe you were going to go first, Bob?

MR. TUCKER: Sure, Your Honor.

Bob Tucker, for the defense.

Your Honor, the first agenda item is a report on the MDL cases, and where we stand right now on the MDL cases is that obviously cases continue to be filed. The direct filing order has assisted, I believe, in Plaintiffs being able to more easily file in the MDL, and so we're seeing more direct filed cases as opposed to cases coming through the conditional transfer order process.

A later agenda item that Ms. Sharko will address and Ms. Relkin will address, the short form complaint and master answer. We again are trying to put in place process that makes sense for the efficient handling of the MDL and to make it sensible and efficient for Plaintiffs' lawyers to file their cases here. So we expect to see that happening.

Very quickly I'll report on the state court cases.

1 We continue to see a large number of cases filed in California
2 that is the subject of a coordination proceeding which has
3 been argued and is pending resolution in California. That
4 decision is expected to occur sometime in the coming weeks.
5 There has also been a request for coordination in New Jersey,
6 and, again, we are waiting on the Court, the Supreme Court in
7 New Jersey or the judicial court in New Jersey to set that
8 coordination proceeding.

9 There are a number of cases that have been filed in
10 state court which have been removed to federal court. Some of
11 those cases involve motions to remand. Those cases, once
12 removed, have been tagged to the MDL with a conditional
13 transfer order. There are motions pending in -- before the
14 Judicial Panel on Multidistrict Litigation to vacate some of
15 those conditional transfer orders. Some have become ripe and
16 were set for hearing I believe last week. So we're expecting
17 orders to be issued. It is our expectation, though of course
18 we don't know what the panel's going to do, but it is our
19 hope, I suppose I should say, that those cases come to this
20 court so that we have one jurisdiction deciding consistently
21 all of the various remand motions.

22 So that's kind of a very brief report, Your Honor, on
23 the MDL.

24 THE COURT: I'm eternally grateful for your
25 confidence in the Court.

1 MR. TUCKER: Well, it's nice to have one judge decide
2 everything.

3 THE COURT: Ellen, did you have anything that you
4 wish to add?

5 MS. RELKIN: Not particularly.

6 Ellen Relkin, Weitz & Luxenberg. That pretty much
7 accurately describes where it is. I mean, New Jersey we think
8 the AOC will probably decide fairly soon which county it will
9 go to, and I think there's about 30 cases pending there right
10 now.

11 THE COURT: Thank you.

12 I want to stress something that Mr. Tucker touched
13 upon and that I've stressed to those of you in leadership
14 before and will continue to do so. And that is this. I have
15 and will continue to stress that process should facilitate and
16 not in any way impede not just filings in this MDL, but the
17 moving of those cases along and the moving of this MDL along
18 so as to best serve the parties, both those already in the MDL
19 and those who will become a part of the MDL.

20 I also want to stress that this court will take every
21 step appropriate, I hope appropriate, to coordinate those
22 processes and that movement, that sense of movement, and in
23 fact actuality of movement, with state court judges who will
24 be handling cases particularly larger in number, we'll get our
25 arms around them, in places like California and New Jersey.

1 Item number three, the explant.

2 Mr. Kennedy.

3 MR. KENNEDY: Yes, Your Honor. Eric Kennedy.

4 Your Honor, we have, after much effort, input from a
5 lot of lawyers, experts, we have finally agreed upon a
6 stipulated explant protocol preservation order. The order
7 itself contains four different protocols, the first dealing
8 with how to get the explant from the hospital physician to a
9 testing lab or storage facility. The second protocol deals
10 with the intake process at that facility. The third protocol
11 deals with specific testing programs that will be conducted at
12 the testing laboratories. And the final protocol deals with
13 the aspects and the details of storage.

14 A matter of highlighting. You know, the order deals
15 with tissue samples removed at the time of explant surgery and
16 any explant that was implanted within the United States. It
17 outlines the fact that if there's a violation of the protocol
18 by independent parties, such as the hospital, the physician,
19 either party can be charged with spoliation of the explanted
20 device.

21 There would be an exchange of results. Defendants
22 have an explant, they do their testing, they will provide
23 their results to Plaintiffs and vice versa. If a plaintiff,
24 prior to the entry of this order, obtains an explant, they
25 still must provide those results. If the Defendants were to

1 obtain an explant prior to the entering of this order,
2 Plaintiffs were notified of that. We have the opportunity to
3 tell them to stop testing and send us the explant because we
4 want the opportunity to evaluate it first, or we can say
5 continue with your testing, finish what you're doing and send
6 it along.

7 Although the protocols outline in great detail the
8 evaluations and testings to be done of these explants, it's
9 not exclusive to that. Parties and their experts may go
10 beyond the protocol as long as their testing evaluation is
11 consistent with the protocol and does not involve any
12 destruction at all of the device.

13 Importantly to many people in this room is the part
14 of the order that deals and addresses with the hospitals and
15 the physicians, the preservation of that explant and the
16 tissue on that explant prior to sending it to the testing lab.
17 It indicates, number one, that Depuy will not interfere and
18 does not object to any agreement that Plaintiff's counsel
19 reaches with the hospital with respect to preservation and the
20 shipping of tissue and explants. It also indicates that if
21 there is a disagreement between the hospital, Plaintiff's
22 counsel or the Plaintiff themselves and the preservation of
23 the explant, the tissue or how it is to be shipped, that the
24 Court will become involved in that process and help resolve
25 that dispute.

1 Anything I missed?

2 MR. TUCKER: Nothing more, Your Honor.

3 THE COURT: Thank you.

4 MR. TUCKER: Thank you.

5 THE COURT: Thank you very much.

6 It is my very humble opinion, as complete and concise
7 at the same time as any order of that nature that I have ever
8 seen, and I want to congratulate those of you who worked on
9 this for completing it in a timely fashion. I should have
10 added at the beginning that if there are those who wish to
11 raise a question, et cetera, during the time we are together,
12 please approach the lecturn and identify yourself to the court
13 reporter and the Court. Those of you who have other questions
14 that you wish to ask of me or any of the other members of the
15 leadership, please feel free to do so after we have adjourned.

16 Thank you.

17 Mr. Tucker, did you want to address the protective
18 order issue?

19 MR. TUCKER: Yes, very briefly.

20 Bob Tucker.

21 Your Honor, similarly, we have worked with the
22 Plaintiffs' executive committee and their discovery committee,
23 actually, and have agreed upon a stipulated MDL protective
24 order that will be put into place so that we can continue this
25 process of getting documents ready to produce here in the MDL.

1 Our interest is in making sure that protective
2 confidentiality, protected document issues don't delay the
3 document production. We want to be able to begin to produce
4 documents here in the MDL. And so with the understanding that
5 that's in everybody's interest that the documents be produced,
6 we've negotiated and will put in place this protective order,
7 it's been submitted to the Court for signature, so that at
8 least that has now been resolved and put aside so that we can
9 continue the next steps in terms of the document production.

10 MR. SKIKOS: Steve Skikos.

11 Just so you know, the protective order that we've
12 agreed to is done without prejudice to either side to argue
13 and address the legitimate confidentiality trademark
14 protective issues after the documents are produced. So the
15 fact that the protective order exists right now does not mean
16 that the Plaintiffs agree that the documents should be
17 protected, it just means that we are -- both sides are, for
18 the speed and the timing of these production, to move it
19 faster, are going to operate under this protective order until
20 such time as we review the documents and then, if we need to,
21 challenge them.

22 Thank you.

23 THE COURT: And the Court in the past, as I indicated
24 to you, Mr. Skikos, and to others, has had similar approaches
25 to discovery items being treated as confidential across the

1 board and then will develop a process of in camera review of
2 any and all of those documents produced which are alleged not
3 to have such confidentiality and will rule accordingly,
4 hopefully in an expeditious fashion.

5 It's my understanding that the parties have agreed
6 upon a short form complaint and master answer. Who wishes to
7 address that issue?

8 MS. SHARKO: Susan Sharko, for the Defense.

9 Yes, the parties have agreed on a short form
10 complaint and a master answer. The forms will be appended as
11 exhibits to the order which I understand will be entered
12 shortly, and that will facilitate and streamline the pleadings
13 process in the case. The parties will deal with motions as to
14 the sufficiency of the complaints down the road but not at the
15 present time.

16 THE COURT: It's my understanding, Ms. Sharko, that
17 at such time as a case is segregated, for instance as a
18 bellwether, at that time the parties shall have the right to
19 file an amended complaint before then delineating the exact
20 elements and claims in an amended complaint, and likewise the
21 Defendants will have the opportunity to address that amended
22 complaint.

23 MS. SHARKO: Exactly right.

24 Thank you.

25 THE COURT: You're welcome.

1 MS. RELKIN: Just a little more amplification,
2 because a couple things are a little unusual.

3 Generally, when we've had master -- we've had short
4 form complaints is an accompanying master long form. Here
5 there is not at this juncture. Defendants wanted the right to
6 ask for one down the road, but right now, for expedience,
7 there is no long form that's getting incorporated. It's just
8 the short form.

9 Secondly, Defendants wanted and we've agreed to have
10 one answer filed. So they're not going to, after Plaintiffs
11 file an individual short form, we're not going to receive an
12 individual answer. There's going to be one omnibus answer on
13 file with affirmative defenses that's basically for all
14 purposes. So that's a little different than what we've seen
15 in other MDLs, but I think this will just make everyone's life
16 easier to get these cases in suit and get to the merits.

17 THE COURT: Anything further on that particular
18 issue?

19 Preliminary disclosure forms. I believe here we're
20 talking about two different disclosure forms, one a very short
21 form, probably single page, and one a much more detailed one
22 than many of us are familiar with.

23 Mr. Skikos.

24 MR. SKIKOS: Steve Skikos.

25 So this litigation we have agreed in concept to a

1 single-page form -- we haven't finished it, but we're almost
2 done -- that will address -- it will give both sides a better
3 understanding of what the scope of this case is about.

4 So as you know, in this particular case a certain
5 percentage of the patients still have the implants inside of
6 them, and the decision to remove the implant is, of course, a
7 medical decision. And what we are trying to do, in help with
8 Judge Polster in the Gadolinium cases, is actually the
9 executive committee kept an active tally of all of the NSF
10 cases from every aspect of wrongful death, who was the
11 manufacturer, a lot of information. We actually did all that
12 work.

13 This one-page form sort of hit me when I was walking
14 up here is very similar, because this is going to give both
15 sides data on the patient population that will be in this MDL,
16 and I actually, before we started this particular hearing,
17 approached California, and I think we want to do the same
18 thing there.

19 So we might have a very large pool of information
20 from this one-page form and information from the Defense, much
21 less information from them, but we'll get some, that will be
22 helpful to the parties to quickly get their hands around what
23 kind of cases we have here. So we're going to try it in this
24 litigation.

25 MS. SHARKO: Nothing further.

1 THE COURT: Am I correct that you're going to
2 finalize your -- as between Plaintiffs and Defendants, the
3 form of that, and then we'll address in relatively short due
4 course, so to speak, the more extensive plaintiff and
5 defendant disclosure forms down the line, and that the -- as I
6 understand it, that some period between 30 and 60 days that
7 short form will be filed, 30 and 60 days after the filing of a
8 complaint? Is that correct?

9 MR. TUCKER: Bob Tucker.

10 Yes, Your Honor. The plan on the what we're calling
11 the preliminary information sheet, as distinguished from a
12 plaintiff fact disclosure or a defense fact disclosure, but
13 this plaintiff information sheet is really -- it doesn't
14 require a lot of review of information or collection of a lot
15 of records. It really is information that probably is in the
16 hands of each of the Plaintiffs' lawyers at the time they file
17 the complaint. So the goal is that that should be able to be
18 filed very shortly after a complaint is filed, and for the "X"
19 number of cases that are already filed, that will be
20 information that is really fairly easily pulled together so
21 that we can, again, as Mr. Skikos has indicated, have a fix on
22 the inventory of cases in the MDL.

23 So we'd like to see, on the cases presently filed,
24 we'd like to see this form filled out within 30 days, if at
25 all possible.

1 THE COURT: Thank you.

2 Ms. Relkin.

3 MS. RELKIN: Yes.

4 Mr. London just reminded me. You know, the service
5 rules are 120 days. And, well, you know, many people after
6 you file a complaint pretty much do service contemporaneously.
7 There may be a given reason here or there in the odd case that
8 service occurs later. So we just think it should run from
9 service of the complaint as opposed to filing of the
10 complaint, the trigger date.

11 THE COURT: Whatever you work out.

12 MR. TUCKER: That's fine.

13 THE COURT: That's fine.

14 MS. RELKIN: Secondly, somebody passed up a note. So
15 if I can just address it since everybody's here. Someone
16 asked with regard to the short form complaints, what about
17 service of process, is it waived, do you still need to send
18 waivers. We discussed this with Defendants. Defendants still
19 wanted to have regular service in accordance with the federal
20 rules. So service is the same as it's always been. I mean,
21 you can do mail service pursuant to the federal rules.

22 THE COURT: Correct.

23 MS. RELKIN: We tried.

24 THE COURT: Okay. Status under Rule 26 conference
25 update.

1 MR. ROBINSON: I'm Mr. Robinson, Mark Robinson. Good
2 afternoon, Your Honor.

3 THE COURT: Good afternoon.

4 MR. ROBINSON: I think it's important -- we've had
5 several meetings, Rule 26 meetings with the Defense, and
6 Mr. Canure (phonetic) and Jeff Hewitt I think was on the
7 phone, and there were some others there. And, of, course,
8 Mr. Gornick and Mr. Penick (phonetic) and others from our
9 discovery team were on these calls.

10 I think that there's a balance. We want to get these
11 documents produced. On the other hand, we want them produced
12 in the best manner possible. We don't want to just get
13 documents, we want to get discoverable-type documents. So
14 that's sort of what's been anything on.

15 But I do think the meetings have been very positive
16 today, Your Honor, and we're having another one Thursday at
17 2:30. That's positive. Our electronic information discovery
18 people are having a call tomorrow. So they're going to talk,
19 which is unheard of, I think. I mean, I've been there in
20 other litigations where the lawyers have their consultants
21 there, but to actually have our consultants talk tomorrow, I
22 think that will be a first.

23 We are -- last night, Mr. Gornick gave the Defense an
24 updated list of sort of a compromise on just asking them to
25 produce native format, but maybe giving us meta data fields

1 and like, and they're going to look at that. They haven't had
2 a chance to really look at it. And then tonight, Daniel
3 Robinson has put together a list of search terms that we've
4 gotten from various people in the litigation. We're going to
5 give that to the Defense, as well.

6 So I think we're moving along, and hopefully the next
7 time we come before you we have a Rule 26 order, Your Honor.

8 Thank you very much.

9 THE COURT: Thank you. Thank you.

10 MR. TUCKER: Bob Tucker.

11 I always try to agree with Mark Robinson. So the
12 fact of the matter is we have had these conferences. There
13 are a lot of issues that the parties have tried to walk
14 through as they work through this 26F(f) conference report.
15 We did get some new proposals last night, which of course we
16 haven't analyzed yet. And then we will, of course, take a
17 look at what we get from Dan Robinson yet today. So we're
18 moving along.

19 THE COURT: Well, you'll be working with the top of
20 the clan with Dan.

21 MR. TUCKER: Well, that's exactly right.

22 THE COURT: I should say, and maybe save it to the
23 end, but I might forget it. What has occurred to date in this
24 MDL, maybe it's not unique, but it is certainly approaching
25 that status. The cooperation between and among counsel is and

1 has been and hopefully will continue to be extremely -- it's
2 outstanding. It's not always thus. In talking with other
3 judges around the country over these past half dozen years in
4 my involvement in MDLs, that may be the most significant
5 complaint is the difficulty in obtaining cooperation. It
6 certainly is near the top of the list. And so I commend you
7 and encourage you to at least endeavor to continue that
8 measure of cooperation.

9 Before we go to the next, I want to emphasize
10 something. There are various attorneys who have been placed
11 in positions of responsibility. You've heard from some of
12 them. And we have, as well, liaison counsel. The role of
13 liaison counsel is extremely important, and liaison counsel is
14 sitting over here.

15 Michelle, would you please stand up.

16 And that lady, who happens to be an excellent
17 attorney, has appeared before me many times, irrespective of
18 her very, very young age, is like a conduit for you folks as
19 between you, the Plaintiffs' executive committee and the
20 Court. Please avail yourself of that. Utilize Michelle as a
21 resource as you would others in executive roles.

22 Thanks, Michelle.

23 Let's move to item eight, which involves the scope of
24 the cases contained in the MDL. And I have indicated that
25 this MDL will contain all ASR cases. There are various types

1 of those cases, and Mr. Tucker is better capable of explaining
2 that than I. But I have agreed that all of those ASR cases
3 will be properly a part of this MDL.

4 Bob?

5 MR. TUCKER: Yes. I mean, referring to ASR
6 generally, I mean, all ASR cases, if you have a ASR with a
7 100-cup series or a 300-cup series it belongs in this MDL. If
8 you have a case that involves a total hip arthroplasty, you
9 know, with a ASR XL, that's here. And there are some that
10 have resurfacing cases, resurfacing hip systems, and those
11 also should be filed in this MDL.

12 The JPML, in a footnote in the transfer order, raised
13 the question as to whether resurfacing cases should be a part
14 of this MDL. The Defense believes and I think the Court has
15 indicated that it believes that ASR resurfacing cases, as
16 well, should be transferred in here. And so we will, as those
17 are filed, tag them to the MDL.

18 THE COURT: Anything?

19 MS. RELKIN: I think we discussed there was going to
20 be CMO, just clarifying that.

21 THE COURT: Yes.

22 The final item on my agenda involves patient
23 solicitation. I'm not going to be expansive about this
24 because I still have it under consideration.

25 It has come to my attention that there is a firm in

1 Texas which has sent out hundreds, thousands of letters to
2 physicians asking for them to refer ASR revision patients to
3 them and offering to pay the cost of those revisions if the
4 patient cannot. I've reviewed those letters, as I've said,
5 that have given me this information, and there is much more
6 background work that I need to do. And I have -- I will tell
7 you that I'm taking it under consideration, because ethical
8 constraints in various states do, in fact, vary, and I want to
9 make sure where I'm going before I get there.

10 But I do want you to understand something, and I want
11 everybody to understand something. I've practiced law or been
12 on the bench since 1957, and I have always felt that ethical
13 constraints are just as important as the law, and maybe more
14 important. And I want to stress that if there is violation of
15 ethical constraints, either violation of, for instance, those
16 incumbent upon us as lawyers to follow or those incumbent upon
17 doctors to follow, I intend to address it strongly. For
18 instance, and this is only a for instance, it seems to me,
19 based upon the little time I've had to reflect, that the
20 decision which impacts this case of whether or not it is time
21 to or necessary to have a revision of the hip implant, joint
22 implant, is a decision to be reached between doctor and
23 patient, not lawyer and client. But that's just me.

24 But I want everybody to know and the word to go forth
25 that we who sit in these cheap black robes take extremely

1 serious, seriously the ethical guidelines and mandates
2 incumbent upon those appearing before us and upon us are very
3 seriously taken, and especially by this judge.

4 Any questions with regard to that? Any observations?

5 Do you have anything to say, Michael?

6 MR. LONDON: I do not, Your Honor.

7 THE COURT: Thank you.

8 Anything further with respect to any item we have
9 discussed or any item which you believe it is important to
10 address at this juncture in our MDL process?

11 Anything further from any member of the executive
12 team for the Plaintiffs?

13 VOICES: No, Your Honor.

14 THE COURT: Defendants?

15 MS. SHARKO: No, sir.

16 MR. TUCKER: No, Your Honor.

17 THE COURT: I want to thank all of you for being
18 here. I encourage you to stay around and chat, because it
19 must be pouring outside. But have good trips home.

20 CERTIFICATE

I, Stephen W. Franklin, Registered Merit Reporter, and
Certified Realtime Reporter, certify that the foregoing is a
correct transcript from the record of proceedings in the
above-entitled matter.

Dated this 18th day of APRIL, 2011.

/s/Stephen W. Franklin

Stephen W. Franklin, RMR, CRR

/	among [1] 15/25 amplification [1] 10/1 analyzed [1] 15/16 another [1] 14/16 answer [6] 2/21 9/6 9/10 10/10 10/12 10/12 any [12] anything [8] AOC [1] 4/8 aol.com [1] 1/17 Appearances [1] 1/12 appeared [1] 16/17 appearing [1] 19/2 appended [1] 9/10 approach [1] 7/12 approached [1] 11/17 approaches [1] 8/24 approaching [1] 15/24 appropriate [2] 4/21 4/21 April [2] 1/5 19/22 argue [1] 8/12 argued [1] 3/3 arms [1] 4/25 around [4] 4/25 11/22 16/3 19/18 arthroplasty [1] 17/8 aside [1] 8/8 ask [3] 2/8 7/14 10/6 asked [1] 13/16 asking [2] 14/24 18/2 aspect [1] 11/10 aspects [1] 5/13 ASR [9] assisted [1] 2/15 attention [1] 17/25 attorney [1] 16/17 attorneys [1] 16/10 avail [1] 16/20	calling [1] 12/10 calls [1] 14/9 came [1] 2/5 camera [1] 9/1 cannot [1] 18/4 Canure [1] 14/6 capable [1] 17/1 case [8] cases [30] certain [1] 11/4 certainly [2] 15/24 16/6 CERTIFICATE [1] 19/20 Certified [1] 19/21 certify [1] 19/21 cetera [1] 7/11 challenge [1] 8/21 chance [1] 15/2 charged [1] 5/19 chat [1] 19/18 cheap [1] 18/25 claims [1] 9/20 clan [1] 15/20 clarifying [1] 17/20 Clematis [1] 1/16 client [1] 18/23 CMO [1] 17/20 collection [1] 12/14 coming [2] 2/17 3/4 commend [1] 16/6 committee [4] 7/22 7/22 11/9 16/19 complaint [13] complaints [3] 9/14 10/4 13/16 complete [1] 7/6 completing [1] 7/9 compromise [1] 14/24 concept [1] 10/25 concise [1] 7/6 conditional [3] 2/17 3/12 3/15 conducted [1] 5/11 conduit [1] 16/18 conference [3] 1/8 13/24 15/14 conferences [1] 15/12 confidence [1] 3/25 confidential [1] 8/25 confidentiality [3] 8/2 8/13 9/3 congratulate [1] 7/8 consideration [2] 17/24 18/7 consistent [1] 6/11 consistently [1] 3/20 constraints [3] 18/8 18/13 18/15 consultants [2] 14/20 14/21 contain [1] 16/25 contained [1] 16/24 contains [1] 5/7 contemporaneously [1] 13/6 continue [9] cooperation [3] 15/25 16/5 16/8 coordinate [1] 4/21 coordination [3] 3/2 3/5 3/8 correct [4] 12/1 12/8 13/22 19/21 cost [1] 18/3 counsel [7] country [1] 16/3 county [1] 4/8 couple [1] 10/2 course [6] 3/17 11/6 12/4 14/7 15/15 15/16 court [20] CPE [1] 1/15 CRR [2] 1/15 19/24 cup [2] 17/7 17/7
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